

**IN THE UNITED STATES DISTRICT COURT  
FOR THE EASTERN DISTRICT OF PENNSYLVANIA**

HELENE BERRY,	:	
	:	
Plaintiff,	:	CIVIL ACTION
	:	
v.	:	
	:	
	:	NO. 01-CV-3101
COUNTY OF BUCKS, and	:	
CHARLES H. MARTIN,	:	
SANDRA A. MILLER, and MICHAEL	:	
FITZPATRICK, Bucks County	:	
Commissioners, and J. ALLEN NESBITT,	:	
Warden, Bucks County Correctional	:	
Facility and Director of Department of	:	
Corrections, and PETER J. DOYLE, and	:	
ROBERT L. GILMORE, JR.,	:	
Defendants.	:	

**MEMORANDUM-ORDER**

**Green, S.J.**

**March \_\_\_\_\_, 2002**

Presently before the Court is the Motion of Defendants County of Bucks, Charles H. Martin, Sandra A. Miller, Michael Fitzpatrick and J. Allen Nesbitt to Dismiss Count II of the Complaint against the County only and to Dismiss Count III of the Complaint against all moving Defendants pursuant to Fed.R.Civ.P. 12(b)(6), Plaintiff's Response, Defendants' Reply and Plaintiff's Sur-reply. For the following reasons, Defendants' motion will be denied.

**I. FACTUAL AND PROCEDURAL BACKGROUND**

According to the Complaint, Plaintiff Helene Berry, an inmate at the Bucks County Correctional Facility (the "BCCF"), alleged that Defendant Peter J. Doyle ("Doyle") and Defendant Robert L. Gilmore, Jr. ("Gilmore"), two employees at the BCCF, sexually assaulted her. (See Compl. at ¶¶ 14-28.) As a result of their alleged assault of Plaintiff, on or about May 29, 2001, Doyle and Gilmore were charged with Institutional Sexual Assault, a third degree felony under Pennsylvania criminal law. (See Compl. at ¶ 24.) Subsequently, Doyle and

Gilmore resigned from their employment at the BCCF. (See Compl. at ¶ 25.)

Plaintiff brought suit against her alleged assailants, Doyle and Gilmore, as well as against the County of Bucks (the “County”), a municipal government entity, Charles H. Martin (“Martin”), Sandra A. Miller (“Miller”) and Michael Fitzpatrick (“Fitzpatrick”), Commissioners on the Bucks County Board of Commissioners, and J. Allen Nesbitt (“Nesbitt”), the Warden at the BCCF and Director of the Department of Corrections. Jurisdiction was premised on 28 U.S.C. § 1331.<sup>1</sup> In the Complaint, Plaintiff raised the following three claims: (1) violation of 42 U.S.C. § 1983 (Count I); (2) violation of the Equal Rights Amendment to the Pennsylvania Constitution (Count II); and (3) assault and battery under Pennsylvania criminal law (Count III).

Pursuant to Fed.R.Civ.P. 12(b)(6), the County, Martin, Miller, Fitzpatrick and Nesbitt (collectively, “moving Defendants”) filed the instant Motion to Dismiss. Defendants claim that Counts II and III should be dismissed against the County because they are barred under the Pennsylvania Subdivision Tort Claims Act (“Tort Claims Act”) and that Count III should be dismissed against all other moving Defendants because Plaintiff has not alleged the elements of an assault and battery against Martin, Miller, Fitzpatrick and Nesbitt.

## **II. LEGAL STANDARD**

Pursuant to Fed.R.Civ.P. 12(b)(6), a court should dismiss a claim for failure to state a cause of action only if it appears to a certainty that no relief could be granted under any set of facts which could be proved. See Hishon v. King & Spalding, 467 U.S. 69, 73 (1984). Because

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<sup>1</sup>Pursuant to 28 U.S.C. § 1367(a), this Court has supplemental jurisdiction over the state law claims alleged by Plaintiff in her Complaint against Defendants because those claims are “so related to claims in the action within such original jurisdiction that they form part of the same case or controversy under Article III of the United States Constitution.”

granting such a motion results in a determination on the merits at an early stage of the plaintiff's case, the district court "must take all the well pleaded allegations as true, construe the complaint in the light most favorable to the plaintiff, and determine whether, under any reasonable reading of the pleadings, the plaintiff may be entitled to relief." Colburn v. Upper Darby Township, 838 F.2d 663, 665-66 (3d Cir. 1988), *cert. denied*, 489 U.S. 106 (1989). "But a court need not credit a complaint's 'bald assertions' or 'legal conclusions' when deciding a motion to dismiss." See Morse v. Lower Merion Sch. Dist., 132 F.3d 902, 906 (3d Cir. 1997) (citations omitted).

### III. DISCUSSION

#### A. *Count II- State Constitutional Claim*

In Count II, Plaintiff alleges a violation of Article 1, §§ 26<sup>2</sup> and 28<sup>3</sup> of the Equal Rights Amendment of the Pennsylvania Constitution against all moving Defendants. (See Compl. ¶¶ 53-56 .) The County argues that it is immune from liability for all state constitutional claims under the Tort Claims Act. (See Defs.' Mot. at 3 (citing 42 Pa. Cons. Stat. §§ 8541 *et seq.*)). Section 8541 of the Tort Claims Act states that "[e]xcept as otherwise provided in this subchapter, no local agency shall be liable for any damages on account of any injury to a person or property caused by the act of the local agency or any employee thereof or any other person." 42 Pa. Cons. Stat. § 8541. Therefore, generally, local agencies and their employees are immune

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<sup>2</sup>Article I § 26 of the Equal Rights Amendment of the Pennsylvania Constitution provides that "[n]either the Commonwealth nor any political subdivision thereof shall deny to any person the enjoyment of any civil right, nor discriminate against any person in the exercise of any civil right."

<sup>3</sup>Article I, § 28 of the Equal Rights Amendment of the Pennsylvania Constitution prohibits discrimination on the basis of sex and states that "[e]quality of rights under the law shall not be denied or abridged in the Commonwealth of Pennsylvania because of the sex of the individual."

from suit under the Tort Claims Act. See Douris v. County of Bucks, No. 99-3357, 2001 U.S. Dist. LEXIS 9282, at \*26 (E.D. Pa. July 3, 2001) (quotation omitted). However, § 8542 of the Tort Claims Act contains eight exceptions to the general grant of immunity provided by § 8541. Under § 8542(b), a local agency may be held liable for the negligent acts of the local agency or employees acting within the scope of their duties involving:

(1) vehicle liability; (2) the care, custody and control of personal property; (3) the care, custody and control of real property; (4) trees, traffic controls and street lighting; (5) utility service facilities; (6) streets; (7) sidewalks; and (8) the care, custody and control of animals.

See 42 Pa. Cons. Stat. § 8542(b).

Plaintiff's central argument in response to Defendant's claim is that the Tort Claims Act "applies [solely] to negligence claims and torts, and does not override the state constitutional Equal Rights Amendment, Article I, § 28." (Pl.'s Resp. at 5.) Plaintiff further asserts that "Defendant's Motion to Dismiss Count II, a Constitutional claim, on the basis of a statute conferring tort immunity upon governmental entities, officials and employees, is tantamount to asking this Court to strike down Pennsylvania's constitutional ERA on the basis of a mere statute." (Pl.'s Resp. at 6-7.) In support of her contention, Plaintiff cites Coffman v. Wilson Police Dep't, 739 F. Supp. 257 (E.D. Pa. 1990), which rejected the municipality's argument that the Tort Claims Act barred plaintiff's claims under Article I, §§ 1, 8 and 26 of the Pennsylvania Constitution and held that "[c]laims arising from violations of the Pennsylvania Constitution may [] be raised against local governments." Id. at 266. The court reasoned that "it would be peculiar if the legislature could abrogate rights protected by the Constitution." Id.

Nevertheless, as indicated by Defendants, other courts have reached the opposite conclusion and found that a plaintiff's state constitutional claims against a public entity were

barred by the Tort Claims Act. See Crighton v. Schuylkill County, 882 F. Supp. 411, 416 (E.D. Pa. 1995) (holding that state constitutional claims asserted by corrections officers against the County based on allegations of a pervasively hostile work environment were barred by the Tort Claims Act because they did not concern negligence falling within the enumerated categories of § 8542); see also Douris, 2001 U.S. Dist. LEXIS 9282, at \*25-28 (granting summary judgment to Bucks County on state constitutional claims based on County's Tort Claims Act immunity).

It should be noted, however, that Plaintiff is seeking to state a claim under the state constitution for \$100,000 in compensatory damages. Yet, in evaluating the parties' cited case law, specifically the *Coffman* decision, it is not apparent that a violation of the state constitution may support a cause of action for damages against a public entity. Some Pennsylvania district courts have alluded to this precise issue, but in each case, have reached a conclusion based on other grounds.

For instance, in McMillian v. Philadelphia Newspapers, Inc., No. 99-2949, 1999 U.S. Dist. LEXIS 12240 (E.D. Pa. Aug. 4, 1999), the court recognized that the case raised "several interesting yet difficult questions as to whether violations of the state constitution could support private damage actions in Pennsylvania and/or whether a state constitutional claim could be barred by the Tort Claims Act," but did not decide these questions because as a threshold matter, plaintiff failed to state a claim for violation of her rights under the state constitution. Id. at \*10-13. In Chantilly Farms, Inc. v. West Pikeland Township, No. 00-3903, 2001 U.S. Dist. LEXIS 3328 (E.D. Pa. Mar. 23, 2001) the court declined to reach the issue of whether violations of the Pennsylvania Constitution can support a private cause of action for damages and dismissed Plaintiff's state constitutional claims based on Plaintiff's failure to properly state a claim under the Pennsylvania Constitution. Id. at \*39-40.

Although federal law, pursuant to 42 U.S.C. § 1983, supports a private cause of action for monetary damages under the United States Constitution, Pennsylvania law contains no such counterpart. See id. at \*36. Moreover, the Pennsylvania Supreme Court has not provided a definitive answer to whether the Pennsylvania Constitution supports a private cause of action and/or whether the statutory provisions of the Tort Claims Act bar such a cause of action. In this situation, the Court is called upon to predict what the highest court in Pennsylvania would conclude. Thus, Plaintiff's cause of action under the Pennsylvania Constitution against all moving Defendants is of the type that should not be disposed of on a motion to dismiss but rather at a later stage after completion of discovery. This course of action is prudent, especially considering that Defendants have offered no challenge to Count I, Plaintiff's § 1983 claim, and as such, discovery and other pre-trial matters related to this claim will necessarily proceed.

The Court is aware of the Third Circuit's decision in Sameri Corp. of Del., Inc. v. City of Philadelphia, 142 F.3d 582 (3d Cir. 1998). In determining whether defendants' conduct deprived plaintiff of "the equal protection and its rights, privileges and immunities" guaranteed under the Pennsylvania Constitution, the Third Circuit stated that "[t]he City [was] immune from [Plaintiff's] claims arising under the equal protection and civil rights sections of the Pennsylvania Constitution because the Act grants it immunity from claims for monetary damages except with respect to eight specific types of tortious conduct, none of which is applicable here." Id. at 600 (citation omitted). Although this statement appears to provide an answer to the issue before the Court, the district court case before the Third Circuit was one decided on summary judgment, following a fuller record. Thus, in the context of the facts before it, the Third Circuit's statement is clear. However, it is not clear if the Third Circuit intended to conclude that under no circumstances could liability be imposed under the Pennsylvania

Constitution because of the provisions of the Tort Claims Act. Accordingly, I will deny Defendants' Motion to Dismiss Plaintiff's state constitutional claims against the County and will await the development of a fuller record and possibly a definitive opinion by the Pennsylvania Supreme Court.

**B. Count III- State Tort Claim**

In regard to Plaintiff's assault and battery claim against the County, Plaintiff pleads that the County can be liable for the intentional torts committed against Plaintiff because the "Plaintiff's person was in the control, custody and care of the County at the time of the intentional torts." (Pl.'s Sur-reply at 2-3.) (emphasis omitted). As against the individual moving Defendants, Plaintiff avers that Defendants Martin, Miller, Fitzpatrick and Nesbitt can be held liable in their official and individual capacities for the intentional torts of assault and battery because these defendants were "responsible for protecting women inmates from sexual assault by their agents and employees [y]et . . . remained *deliberately indifferent* to the basic human rights of women inmates, Plaintiff in particular, and did nothing to protect her and others from criminal assaults during incarceration." (Pl.'s Compl. ¶ 41) (emphasis added). Essentially, Plaintiff is claiming that liability may be imposed on the individual Defendants because in abdicating their duties at the prison, they fostered an environment whereby the alleged sexual assault of Plaintiff by Defendants Doyle and Gilmore was inevitable.

In response, Defendants contend that the pleading is insufficient to state a cause of action under Pennsylvania law. They argue that these claims fail against the County as a matter of law because of the County's immunity under the Tort Claims Act and that the claims against Martin, Miller, Fitzpatrick and Nesbitt also fail because Plaintiff has not alleged any facts in the Complaint to support Plaintiff's theories of liability against these individual Defendants.

While Plaintiff's pleadings may not be a model of clarity, under the standard for a motion to dismiss, I must take all the well pleaded allegations as true and construe the complaint in the light most favorable to the plaintiff and may grant such a motion only if it appears to a certainty that no relief could be granted under any set of facts which could be proved. At this time, I cannot conclude that no cause of action for assault and battery could arise out of the Complaint. It is better to decide whether the moving Defendants can be held liable after discovery and at a later stage of the proceeding. Therefore, I will deny the moving Defendants' motion to dismiss Plaintiff's assault and battery claim against them.

An appropriate order follows.



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Corrections, and PETER J. DOYLE, and	:	
ROBERT L. GILMORE, JR.,	:	
Defendants.	:	

**ORDER**

**AND NOW**, this \_\_\_\_\_, day of March, 2002, upon consideration of Defendants' Motion to Dismiss Count II of the Complaint against Defendant County of Bucks and Count III of the Complaint against Defendant County of Bucks, Charles H, Martin, Sandra A. Miller, Michael Fitzpatrick and J. Allen Nesbitt, **IT IS HEREBY ORDERED** that Defendants' motion is **DENIED**.

BY THE COURT:

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CLIFFORD SCOTT GREEN, S.J.